[redacted]

SUPREME COURT OF THE UNITED [redacted]

[redacted]

No. [redacted]

[redacted]

JOHN G. PRIDGEN, PLAINTIFF IN [redacted]

vs.

THE CITY OF ST. LOUIS.

[redacted]

IN ERROR TO THE SUPREME COURT OF [redacted]

[redacted]

[redacted]

(14,[redacted])

(18,803.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 204.

JOHN G. FISCHER, PLAINTIFF IN ERROR,

vs.

THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1901, thereof, between The City of St. Louis, respondent and John G. Fischer, appellant, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord one thousand nine hundred and two.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States, for the western district of Missouri, central division dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by

G. D. BURGESS,
Chief Justice.

1½ [Endorsed:] No. — United States circuit court, western district of Missouri, central division City of St. Louis, resp't *vs.* John G. Fischer app'l't Writ of error to the supreme court of the State of Missouri. Filed Jun- 30 1902 Jno. R. Green clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Western District of Missouri, } ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 16th day of July, A. D. 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk,*
By SPEED MOSBY, *D. C.*

2 The United States of America to the City of St. Louis Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri, wherein John G. Fischer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Gavon D. Burgess chief justice of the supreme court of Missouri, this 25" day of June in the year of our Lord one thousand nine hundred and two.

G. D. BURGESS,
Chief Justice.

2½ [Endorsed:] Supreme court of Missouri. City of St. Louis, resp't *vs.* John G. Fischer, app'l't. Citation. Filed Jun- 30, 1902, Jno. R. Green, clerk.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } ss:

I hereby acknowledge due service of the within citation, this 28th day of June A. D. 1902.

CHAS. W. BATES,
Attorney for Defendant in Error.

3 STATE OF MISSOURI, *sct:*

In the Supreme Court of Missouri.

Be it remembered, that heretofore to-wit, on the 15th day of September, 1899, there was filed in the office of the clerk of the supreme court of the State of Missouri, a transcript from the St. Louis court of criminal correction, wherein The City of St. Louis was respondent and John G. Fischer was appellant, which said transcript is in words and figures as follows, to-wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

In the St. Louis Court of Criminal Correction.

Be it remembered, that on the 21st day of January in the year of our Lord eighteen hundred and ninety-nine, there was filed in the office of the clerk of the St. Louis court of criminal correction, by the clerk of the 2nd police district court of the city of St. Louis, a transcript and the papers in the case of The City of St. Louis *versus* John G. Fischer; which transcript and papers are in the words and figures following, to-wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
vs.
JOHN G. FISCHER, Defendant. }

Be it remembered that on November 22, 1898, the assistant city attorney of the city of St. Louis, filed in the second district police court, in the city of St. Louis, Missouri, his complaint against defendant herein, in words and figures as follows:

John G. Fischer to the City of St. Louis, Dr.

To five hundred dollars, for the violation of an ordinance of said city entitled "An ordinance in revision of the ordinances of
4 the city of St. Louis, and to establish new ordinance provisions for the government of said city," being ordinance number 18,407, section 5, approved April 6, 1896.

In this, to wit; in the city of St. Louis, and State of Missouri, on the 16th day of November, 1898, and on divers other days and times prior thereto, the said John G. Fischer, being the (1) occupant

of the premises known as 7208 and 7210 North Broadway, in said city, did then and there erect, build and establish on said premises a dairy and cow stable, without first having obtained permission so to do from the municipal assembly by proper ordinance (2) and furthermore said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having been obtained from the municipal assembly by proper ordinance, said dairy and cow stable not having been in operation at the time of the approval of ordinance No. 18,407 to wit: April 6th, 1896.

Contrary to ordinance in such case — and provided.

On information of Charles W. Francis.

ERNST C. DODGE,
Ass't City Attorney of the City of St. Louis.

Thereupon a summons was issued, returnable November 29, 1898. Defendant appeared, and after various continuances, defendant filed his motion to quash the statement in the above entitled cause, which motion was in the said court overruled. The cause coming on for trial, January 14th, 1899, and defendant appearing, defendant was fined $100.00; and thereupon, and on the same date, defendant made and filed his affidavit for appeal, and made and filed his bond for such appeal; his bond was duly approved and appeal granted to the St. Louis court of criminal correction.

And now, on January 21, A. D. 1899, the foregoing papers, complaint, summons, motion to quash, affidavit for appeal, and appeal bond and transcript of the proceedings in the second district police court were filed in the court of criminal correction in the said city of St. Louis. By leave of court the defendant's motion to quash the city attorney's statement as filed in the police court was refiled in the St. Louis court of criminal correction, duly argued and submitted to the court and by the court overruled, to which action of the court in overruling said motion, the defendant then and there duly saved his exceptions; said motion to quash is in words and figures as follows, to-wit:

In the Second District Police Court.

CITY OF ST. LOUIS
vs.
FISHER.

Now comes defendant and moves the court to quash the writ and statement in above entitled cause, for the following reasons, to-wit:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis.

2nd. Because section five of said ordinance No. 18407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section five is void as being unreasonable and oppressive to the citizen and the property owner.

4th. Because said section is void there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

5th. Because said section five is retrospective in its nature and application, therefore in violation of the rights of private property.

6th. Because said section five is void, being a delegation of the powers of the municipal assembly.

7th. Because said section five is in violation of section 30, art. II, of the constitution of the State of Missouri.

8th. Because said section five is in violation of section 4 of art. II of the constitution of the State of Missouri.

6 9th. Because said section five is void as being in violation of the XIV amendment to the Constitution of the United States in that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

E. F. STONE,
Att'y for Def't.

The cause, then, after several continuances, was called for trial in the St. Louis court of criminal correction, the defendant pleading not guilty, the cause was submitted on an agreed statement of facts as follows:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS }
vs.
JOHN G. FISCHER. }

Agreed Statement of Facts.

It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of ordinance No. 18407, of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant for the purpose

of operating a dairy and maintaining a cow stable, and this
7 defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Sometime in the month of March 1898, the said premises at Nos. 7208 and 7210 North Broadway *were abandoned* as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for *residence purposes only*, and no dairy or cow stable was maintained on said premises from March 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises Nos. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance as provided by section 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked "Exhibit A" which is attached to and made a part of this agreed statement of facts is a full, true and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause.

CHARLES H. BROCK,
Attorney for Plaintiff.
LOUIS A. STEBER,
Attorney for Defendant.

Said ordinance No. 18,407 is in words and figures, as follows:

(18,407.)

An ordinance to regulate cow stables and dairies within the corporate limits of the city of St. Louis, prescribing how they may be maintained, defining when they shall be deemed a nui-
8 sance, providing for their inspection by veterinary surgeons and sanitary officers, and fixing the salaries of the veterinary surgeons. Also, to repeal section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three, of article eight of chapter fourteen of the Revised Ordinances of the City of St. Louis of One thousand eight hundred and ninety-three.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. All dairies, cow stables and cow lots in the city of St. Louis shall conform to and be managed and regulated as shall be provided for by this ordinance.

SEC. 2. It shall be the duty of the sanitary officers of the health

department to inspect all stables, barns, buildings, sheds and all places of any kind, including lots and pastures where cows are kept or fed, whose milk or cream is sold, used, delivered or disposed of in the city of St. Louis.

SEC. 3. All cow stables shall be washed out and thoroughly cleaned at least once a day, and all cow lots or cow yards shall be cleaned once a week. No liquid discharge from any cow stable or dairy or cow lot shall be conducted or placed on any public or private property or into any stream or water course within the limits of the city. All dairies and milk depots shall have suitable facilities for the keeping and cooling of milk. All persons, firms or corporations who own or keep a dairy or cow lot shall maintain the premises free from any accumulation of manure or refuse whatever. Every person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each and every offense.

SEC. 4. No dairy or cow stable shall be hereafter erected or established unless it will have connection with the city sewer system, if such be practicable. No dairy shall be allowed to discharge into any public district or private sewer any manure or any substance that may cause said sewer to choke up, and no dairy shall have connection with any public district or private sewer except through two intervening catch basins of such kind as may be prescribed by the board of public improvements so as to prevent any straw, hay or manure from entering the sewer. Any person interfering with said catch basins or failing to construct said catch basins or violating any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than one hundred dollars.

9

SEC. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

SEC. 6. Before the building commissioner shall issue a permit for the erection, building or establishment of any dairy or cow stable, there shall be made to him in duplicate by the persons or parties so desiring to do, an application in writing, to which shall be attached a certified copy of the ordinance giving the permission. The application shall set forth:

First. The location of the proposed dairy or cow stable.

Second. The name of the party or parties proposing to go into the dairy business.

Third. The name or names of the owner or owners of the ground on which the dairy or cow stable is to be located.

Fourth. The number of cows proposed to be kept.

Fifth. The size and dimensions of the stable.

Sixth. The dimensions and boundaries of the lot or pasture
10 in which the cows are to be turned out.

Seventh. Whether the cow stable can be connected with the sewer system of the city or not.

Eighth. If it can not be connected with the sewers what arrangements exist, if any, for the removal of manure and liquid from the stable.

Ninth. Whether the stable can be supplied with city water, and if not, what arrangements exist for cleaning out the same.

The building commissioner shall forward one of said applications to the health commissioner.

SEC. 7. All cow stables hereafter erected, built or established, shall comply with the following regulations: All single stalls shall be at least three feet wide, double stalls six feet wide, and all stalls shall be at least seven feet long; the height of ceilings from the floor shall be at least eight feet; the floors must be of tight plank, or be paved with brick or stone, laid in cement; if paved with brick or stone, then the earth below it shall be sufficiently solid to prevent its becoming a receptacle of filth and offensive matter; the floors of the stalls shall slope down into a drain or gutter, which shall be at least twelve inches wide and four inches deep, and said drain or gutter shall connect with and lead into a sewer through two intervening catch basins or tightly cemented cesspool, so that waste matter can be carried or hauled away. Openings for ventilation must be placed on at least two sides of the building, with openings not less than two feet square for every double stall or two single stalls, and there must be roomy ventilators in the roof not less than one for every twenty feet or fraction thereof in the length of the building. All cow stables hereafter to be built or established, except the entrance from or exit to, with street or alley, or casement or passageway, shall be at least three feet away from the building line. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than
11 fifty dollars nor more than one hundred dollars for each and every day the work is done thereon, or said cow stables used as such, each day of which shall constitute a separate and distinct offense.

SEC. 8. In the construction, alteration and improvement of all cow stables, arrangements for proper ventilation, light and drainage shall be made, and all alterations and improvements in cow stables now constructed shall be made to conform with the provisions in relation to new stables as provided for in section seven of this ordinance.

SEC. 9. All dairies or cow stables, now erected or established, when found to be so badly lighted or ventilated as to be injurious or unhealthy for cows, or not provided with legal catch basins or

tightly cemented cesspools, so that waste matter can be carried or hauled away, or shall be conducted in an uncleanly manner, shall be deemed a nuisance. It shall be the duty of the board of health when any report shall be made of the bad or improper construction of any dairy or cow stable, or of any nuisance created by any dairy, cow stable or cow lot, to notify the owner or proprietor thereof to show cause before the said board of health at the time and place specified in said notice, why said dairy or cow stable should not be altered or changed, or such defects remedied or nuisance removed, which notice for the party complained against to appear shall be served at least five days before the date specified in such notice; said notice shall be served by leaving the same at the place of business or residence of the parties to be affected thereby by some officer or person duly qualified to certify to such notice; and all notices of this kind issued by the board of health shall be signed by the presiding officer of the board of health or the health commissioner. At the time fixed in said notice the parties may appear in person or by attorney, or cause may be shown by affidavit, and if in the opinion of the board of health and health commissioner no good and sufficient cause be shown why the said nuisance should not be abated, discontinued or removed, or said cow stables recon-
12 structed, the health commissioner shall order the said parties to abate, discontinue, remove or reconstruct the same within such time as the health commissioner may deem reasonable and necessary. If, upon the hearing of the affidavits and the evidence adduced in the case, the board shall find the facts to be in favor of the parties before them, and so decide, the case shall be dismissed.

SEC. 10. Any person or persons failing or refusing to obey such order of said health commissioner shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars; and such person or persons shall be subject to like fines for each and every day he, she or they shall continue such nuisance or fail to obey the order of the health commissioner after the expiration of the time specified in the order of the health commissioner for the abatement, removal or discontinuance of the same. The fines mentioned in this ordinance shall be collected as other fines and paid into the city treasury.

SEC. 11. The health commissioner, by and with the approval of the board of health, shall appoint two practical veterinary surgeons as inspectors of live stock, who shall perform their duties under the immediate supervision of the chief sanitary officer. Said veterinary surgeons shall each receive a salary of one hundred and seventy-five dollars per month, and shall each provide himself with a horse and buggy and maintain same at his own expense for the expeditious performance of his duties. Said veterinary surgeons may be discharged by the health commissioner with the approval of the board of health for violation of rules or neglect of duty.

SEC. 12. The veterinary surgeons appointed under the provisions of this ordinance shall each give a good and sufficient bond to the city of St. Louis in the penal sum of five thousand dollars, said bond

to be approved by the mayor and council, and the conditions of said bond shall be that veterinary surgeons shall well and faithfully execute and perform the duties of their office; provided that no one shall be competent to serve as bondsmen for said
13 veterinary surgeons who shall be either directly or indirectly interested in the milk or dairy business.

SEC. 13. Said veterinary surgeons and sanitary officers shall have the right, and it shall be their duty to have full access, egress and ingress to all places, buildings, cow yards, cow lots and cow stables where cows are kept for milking purposes or for purposes of sale; and they shall have the right, and it shall be their duty to examine all cows to determine whether the same are sick or diseased or have been exposed to or have been contaminated or affected by any contagious or infectious disease. Any person or persons who in any manner interferes, hinders, obstructs, delays, resists, denies, prevents, or in any manner interferes or attempts to interfere, with said veterinary surgeons or sanitary officers in the discharge of their duties, or any person or persons being the owner, agent or manager of any cow stable, dairy or cow lot, or any building where cows are stabled or may be kept, who shall refuse to permit any cow to be viewed or inspected by said veterinary surgeons, or who attempts to conceal, run or drive away any cow supposed to be diseased, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars for each and every offense.

SEC. 14. Veterinary surgeons shall each, when on duty, wear a metal badge, which badge shall be numbered, and shall have the words "Veterinary surgeon of health department of city of St. Louis," plainly marked on same. Said badge shall be supplied by and be the property of the city.

SEC. 15. The health commissioner is hereby empowered to require said veterinary surgeons to go outside the corporate limits of the city of St. Louis to any point within a radius of one hundred and fifty miles, to examine the physical condition of cows whose milk is or may be brought into the city of St. Louis for sale; and all vouches for traveling expenses incurred by said veterinary surgeon or surgeons in the discharge of this duty when signed by the health commissioner and approved by the board of health, shall be
14 paid out of the fund appropriated for the expense of the board of health and health commissioner.

SEC. 16. When said veterinary surgeon or surgeons shall find any cow or cows in a dairy, from which dairy milk is brought into this city for sale, to be diseased, they shall immediately make a report of the facts in duplicate; one of said reports to be delivered to the health commissioner and the other to the person, firm or corporation receiving and disposing of the milk from such cows. On receipt of a report that milk from diseased cows is being brought into this city the health commissioner shall issue an order forbidding its sale in the city of St. Louis until such time as the health commissioner is satisfied by approved veterinary certificate that such dis-

eased cows have been separated from the balance of the herd; and if the parties who shall have been served with such order fail to obey the same, the health commissioner is hereby empowered to give notice to the citizens of St. Louis through the newspapers doing the city printing, stating all the facts in the case, and to warn them against the use of such milk. And said parties may be proceeded against in the manner prescribed by the provisions of this ordinance.

SEC. 17. Any person, firm or corporation having in possession a sick or diseased cow shall forthwith report said fact at the office of the health commissioner, who shall thereupon at once examine or direct any veterinary surgeon to make examination thereof. Any sick horse or other animal kept in or about stable, premises or places where milch cows are kept or milked, shall in like manner be reported. For any failure, neglect or delay in so reporting any sick or diseased cow or other sick animal, the offender shall be deemed guilty of a midemeanor, and upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

SEC. 18. If any cow be found sick or diseased the owner or the person in charge thereof shall not sell, offer for sale, exchange, deliver or keep, expose for sale, exchange or deliver the milk or cream thereof, but shall at once destroy the same. If, in the opinion of the veterinary surgeon, or any inspector, said cow is afflicted with a contagious or infectious disease, he shall direct the owner or person in charge thereof to forthwith remove said cow from the premises to a place where it may not spread or cause contagion or infection. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars. If, in the opinion of, and after an examination by the veterinary surgeon, said cow is deemed incurable, and the owner or person in charge thereof does not consent to its being killed, such officials shall cause two disinterested and experienced persons to view and examine the same. If said persons agree and certify in writing that said sickness or disease is incurable and likely to spread contagion or infection, and the health commissioner, in writing, approves said finding and judgments, the veterinary surgeon shall forthwith kill said animal and see that the carcass is removed and so disposed of that it cannot be sold for human food. If cows in any dairy located outside of the city limits are found to have any contagious disease the veterinary surgeons shall mail a notice of such fact to the State authorities.

SEC. 19. Any officer or employé of the city of St. Louis who wilfully connives at or assists in a violation of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and shall at once forfeit his office as provided by law in this ordinance.

SEC. 20. Whenever in any house connected with any dairy there is any case of smallpox, diphtheria, scarlet fever or typhoid fever,

the sale of milk from such dairy or depot is prohibited until the disease has terminated and the premises fumigated. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars.

16 SEC. 21. Any person failing to comply or violating any of the provisions of this ordinance, for which no special penalty has been prescribed shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty nor more than five hundred dollars.

SEC. 22. Section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three of article eight, of chapter fourteen, of the Revised Ordinances of the City of St. Louis, approved April seventh, eighteen hundred ninety-three, are hereby repealed.

Approved April 6th, 1896.

To the introduction of which section 5 of said ordinance the defendant objected on the ground that it is unconstitutional and void for the reason that it tries to deprive a person of property without due process of law: because it is void as being unreasonable and oppressive to the citizen and property owner: because it is void for want of power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same: because it is retrospective in its nature and application, and therefore in violation of the rights of private property: because it is void as being a delegation of the powers of the municipal assembly: because it is void as being in violation of the XIV amendment to the Constitution of the United States in that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal — of the laws:" because it is foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, arts. 3, section 26, paragraph 6: because it is in violation of the provisions of the constitution of Missouri, particularly in arts. II, section 4, articles II, section 15, articles II, section 30.

17 Thereupon, the court, on March 11, 1899, the case being duly submitted, after having carefully considered the law and the evidence assessed a fine of $100 and the cost upon the defendant, to which action of the court on March 11, 1899, the defendant then and there duly excepted.

And now, on March 14, 1899, the defendant filed his motion for a new trial in words and figures as follows:

STATE OF MISSOURI, }
City of St. Louis, } ss:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
vs.
JOHN G. FISCHER, Defendant. }

Now comes defendant and moves the court to set aside the verdict and judgment herein, and grant to him a new trial for the following reasons, to-wit:

First. Because under the stipulated facts the verdict and judgment should have been for the defendant:

Second. Because the court erred in its conclusions of law under the stipulated facts:

Third. Because the ordinance on which this prosecution is founded is unconstitutional and void,

(*a.*) As being foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, article 3, section 26, paragraph sixth;

(*b.*) As being in violation of the provisions of the constitution of Missouri, particularly in article 2, section 4, article 2, section 15, and article 2, section 30;

(*c.*) As being in violation of the Constitution of the United States, in article 14, section 1, in each of its parts;

(*d.*) That if the provisions of the city charter of the city of St. Louis in article 3 section 26, paragraph sixth, bear the construction placed upon them by this court, they are void, repugnant to, and in conflict with, the constitution of Missouri and the Constitution of the United States as indicated in this motion in points third *b* and third *c*;

Fourth. Because the verdict is against the law;

Fifth. Because the verdict is against the evidence;

Sixth. Because the verdict is against both the law and the evidence, and the law under the evidence;

Seventh. Because the court erred in failing to pass upon the question of the constitutionality or unconstitutionality of the ordinance, as it was in duty bound to do.

LOUIS A. STEBER,
Att'y for Defendant.

Defendant also at the same time filed his motion in arrest of judgment, which motion is in words and figures as follows:

STATE OF MISSOURI, }
City of St. Louis, } ss:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
vs. }
JOHN G. FISCHER, Defendant. }

Now comes the defendant and moves the court to arrest the judgment rendered in this cause and for his discharge herein, for the following reasons, to-wit:

First. Because under the stipulated facts the verdict and judgment should have been for the defendant;

Second. Because the court erred in its conclusions of law under the stipulated facts;

Third. Because the ordinance on which this prosecution is founded is unconstitutional and void;

(*a.*) As being foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, in article 3, section 26, paragraph sixth;

(*b.*) As being in violation of the provisions of the constitution of Missouri, particularly in article 2, section 4, article 2, section 15, article 2, section 30;

19 (*c.*) As being in violation of the Constitution of the United States in article 14, section 1, in each of its parts;

(*d.*) That if the provisions of the city charter of the city of St. Louis in article 3, section 26, paragraph sixth, bear the construction placed upon them by this court, they are void, repugnant to and in conflict with the constitution of Missouri and the Constitution of the United States as indicated in this motion in points third *b* and third *c;*

Fourth. Because the verdict is against the law,

Fifth. Because the verdict is against the evidence,

Sixth. Because the verdict is against both the law and the evidence, and the law under the evidence.

LOUIS A. STEBER,
Att'y for Defendant.

Defendant further at the same time filed his motion for judgment *non obstante veredicto,* in words and figures as follows:

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
vs. }
JOHN G. FISCHER, Defendant. }

Now comes defendant and moves for a verdict and judgment herein in his favor upon the undisputed and stipulated facts, notwithstanding the verdict and judgment herein rendered.

LOUIS A. STEBER,
Att'y for Defendant.

All of the said motions being duly argued and submitted to the court, were duly taken under advisement and having been fully considered by the court, the court, on July 15th, 1899, overruled all of said motions, to which action of the court, in overruling each and every one of said motions, the defendant then and there duly excepted to each separate action of the court in overruling each of said motions.

20 Now, on said July 15, 1899, the defendant filed his affidavit for appeal, and gave an appeal bond, which was duly approved by the court, and prayed for his appeal to the supreme court of Missouri, which appeal was duly granted as prayed for.

Now inasmuch as many of the foregoing acts are not of record in this cause, the defendant presents them herewith in this, his bill of exceptions, and prays they may be made of record herein, and that this bill of exceptions be also duly allowed and made a part of the record in this cause, which, having been considered and examined by the court, is this fifteenth day of July, 1899, duly granted and allowed by the judge of the St. Louis court of criminal correction.

And now it is further ordered by the court that this cause, together with a transcript of the same, be duly certified to the honorable *of the* supreme court of Missouri for further action herein as the said court may deem just and proper.

WILLIS H. CLARK,
Judge St. Louis Court of Criminal Correction. [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Alfred J. Wagenman, clerk of the St. Louis court of criminal correction, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in said court, in the cause of The City of St. Louis *versus* John G. Fischer, as fully as the same remains of record and on file in my office.

[SEAL.] In testimony whereof, I have hereto set my hand and affixed the seal of said court at office, in the city of St. Louis, this 21st day of August, in the year of our Lord eighteen hundred and ninety-nine.

ALFRED J. WAGENMAN, *Clerk.*

21 And afterwards, to-wit, on the 19th day of October, 1901, the following proceedings were had in said cause, viz:

ST. LOUIS, Respondent,
vs.
JNO. G. FISCHER, Appellant.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court on briefs.

And afterwards to-wit, on the 7th day of January, 1902, the further following proceedings were had in said cause, viz:

ST. LOUIS, Respondent,
vs.
JNO. G. FISCHER, Appellant.

Now at this day, it is ordered by the court that this cause be transferred to the court in banc.

And afterwards to-wit, on the 24th day of January, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court.

And afterwards to-wit, on the 19th day of February, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.
Appeal from St. Louis Court of Criminal Correction.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of criminal correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover
22 against the said appellant its costs and charges herein expended, and have therefore execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1901.

THE CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

This is a civil action by the City of St. Louis to recover a fine of $100.00 for the violation of section 5 of a city ordinance of said city numbered 18407, approved April 6th, 1896, which said section is in these words:

"No dairy or cow stable shall hereafter be erected, built or established *within the* limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars."

The complaint charged that defendant in the city of St. Louis and State of Missouri *did* on the 16th day of November, 1898, and on divers other days and times prior thereto was the occupant of certain premises known as 7208 and 7210 North Broadway in said city, and did then and there erect, build, and establish on said premises a dairy and cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance, and furthermore did at said times and place maintain said dairy and cow stable without having obtained permission from said municipal assembly of said city by proper ordinance and that said dairy and cow stable was not in operation at the time of the approval of said ordinance No. 18407, to wit, April 6th, 1898, contrary to the said ordinance.

23 The defendant was found guilty in the police court and appealed to the court of criminal correction. In the last mentioned court he moved to quash the complaint on nine grounds, as follows:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis.

2nd. Because section 5 of said ordinance No. 18407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section 5 is void as being unreasonable and oppressive to the citizen and the property owner.

4th. Because said section is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

5th. Because said section is retrospective in its nature and application and therefore in violation of the rights of private property.

6th. Because said section 5 is void, being a delegation of the powers of the municipal assembly.

7th. Because said section is in violation of section 30 art. II of the constitution of the State of Missouri.

8th. Because said section 5 is in violation of section 4 of article II of the constitution of Missouri.

9th. Because said section 5 is void as being in violation of the XIV amendment to the Constitution of the United States in that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The court of criminal correction overruled this motion and thereupon — entered his plea of not guilty and the cause was submitted to
24 that court upon an agreed statement of facts, without a jury, and the court found defendant guilty of a violation of said ordinance and fined him $100.00; from which he appeals to this court.

The agreed statement of facts is in these words:

"It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of ordinance No. 18,407 of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as 6305 Bulwer avenue, said city and State. Sometime in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises No. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows

milk, and sell the same to his customers for profit; and was so doing on the said sixteenth day of November, 1898, without having
25 first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18,407, of the city of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked Exhibit A, which is attached to and made a part of this agreed statement of facts, is a full, true and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause.

Section 5 of ordinance No. 18,407, with a violation of which defendant was charged, is as follows:

"SEC. 5. No dairy or cow stable shall hereafter be erected, built or established, within the limits of this city, without first having obtained permission so to do from the municipal assembly, by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises, unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

The transcript in this case is somewhat difficult to understand. It is either all record proper, or all bill of exceptions. There is nothing in the nature of the record proper showing a trial, the entry of judgment, the filing of any of the motions, or the action taken by the court thereon. There is nothing in the transcript showing any copy of the affidavit for appeal, the bond for appeal, or the order granting an appeal tot his court. There is nothing showing the filing of a bill of exceptions. At the same time these matters are set forth as if in a bill of exceptions, signed by the judge of the trial court.

I.

The city of St. Louis is a municipal corporation, existing under a charter framed and adopted by the qualified voters therein
26 on the 22nd day of August, 1876, which took effect October 22nd, 1876, (State *ex rel. vs.* Sutton, 3 M. A. 388), pursuant to the provisions of sections 20, 21, 22, 23, 24 and 25 of article 9 of the constitution of Missouri, 1875, and has all the force and effect of a charter which emanates from the General Assembly, Kansas City *vs.* Oil Co. 140 Mo. 458. By the 6th paragraph of section 26 of article 3 of the said charter the mayor and the municipal assembly of St. Louis are given power within the city, by ordinance not inconsistent with the constitution or any law of this State or the charter itself, "to *prohibit* the erection of soap factories, stock yards, and slaughter houses, pig pens, *cow stables and dairies*, coal oil and vitriol factories, within prescribed limits, and to remove and regulate the same; and

to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health."

On April 6th 1896, the mayor and municipal assembly passed the ordinance set out in the accompanying statement making it a misdemeanor for any person thereafter to erect, build or establish or maintain within the limits of said city any dairy or cow stable without having first obtained permission so to do from the municipal assembly by a proper ordinance and prescribing a penalty for a violation thereof.

At the outset it will be observed that *express power* is conferred upon the mayor and municipal assembly to *prohibit*, and to remove and regulate cow stables and dairies *within prescribed limits*.

To the mayor and assembly is confided the power of fixing and *prescribing* the limits within which no dairy or cow stable shall be built or maintained in the city of St. Louis. As the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the State and properly subjects it to rigid rules of regulation, and even absolute prohibition in large and populous cities. Indeed, few occupations are so peculiarly liable to
27 cause injury by the sale of impure milk, to people who purchase milk as a necessary article of food or which are more generally regarded as nuisances, even under favorable circumstances.

That the people of the State could delegate this power to the municipality is no longer open to dispute. It clearly falls within the proper function of municipal government.

As the people of the State have conferred the power upon the city without restriction, it was entirely within the discretion of the mayor and assembly to prescribe the limits and it was competent to fix the boundaries of the city as the prescribed limits and this was done by the ordinance 18407.

Counsel for defendant insists that the municipal assembly must have first designated certain districts within the city by metes and bounds, within which no dairy or cow house should be erected or maintained, but the charter does not so command. It nowhere limits the prohibited territory to less than the whole city. Counsel for defendant cites *In re* Linehan, 72 Cal. 114 as sustaining his position. But reference to that case will show that the charter power was "to exclude *from certain limits*" the obnoxious occupations, and the city council had merely defined a district bounded by certain streets in which it should be unlawful for any person to keep more than two cows and the supreme court upheld the ordinance. No question of the power of the city of San Francisco to make such an ordinance applicable to the whole of said city arose in that case and nothing in the decision supports the proposition now advanced that the city of St. Louis must necessarily prescribe a district therein less than its municipal boundaries, and we have no doubt of the power under the charter to make the prescribed limits co-extensive with the city limits, and this we construe this ordinance to have done.

But the learned counsel for defendant argues that because the city

has not made the prohibition absolute and prevented all persons
from erecting or maintaining dairies and cow stables any-
28 where in the city but has deemed it proper to say that no
person should erect or maintain a dairy or cow stable without permission first obtained by a proper ordinance, this ordinance is void:

That it provides for special privileges to one man by special ordinance which it might deny to another man, his next door neighbor. We think his position is entirely untenable. The charter confers not only the power *to prohibit*, but to remove and *regulate* and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose upon all persons desiring to erect or maintain a dairy or cow stable to first obtain permission from the mayor and assembly by a duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions. Railroad *v.* Kirkwood, 159 Mo. 239. As was said in St. Louis *v.* Howard, 119 Mo. loc. cit. 46. "Regulation" means a rule or order for management or government." So that paragraph 6 of section 26 of article 3 of the charter empowers the city (*by ordinance, of course*, for that is the only way the city can legislate) to prescribe rules whereby slaughter houses may be erected or operated, or whereby such erection or operation may be checked or restrained, *either partially* or in toto, but in that case the defendant was acquitted because although the city had plenary powers in this regard, it had not seen fit to exercise them by an ordinance making it a misdemeanor to carry on or operate a slaughter house "*without first* having *obtained* permission so to do from the municipal assembly by proper ordinance."

In this case, the city has passed just such an ordinance and made it coextensive with the boundaries of the city, and just such an ordinance met the approval of this court in St. Louis *v.* Howard, 119 Mo. 47, the only difference being that in the last mentioned case it was forbidden to erect a slaughter house within three hundred feet of any dwelling house, whereas in this ordinance dairies are prohibited throughout the city unless the assembly shall first permit them by proper ordinances.

We are asked to declare this ordinance void in the face of
29 the unrestricted power in the charter because forsooth the
assembly may at sometime discriminate against one man and favor another. We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall, as was said in City *v.* Howard, 119 Mo. 50, assume that the municipal assembly before granting permission will inquire and determine whether the place and the neighborhood is a proper one in which to allow a dairy to be maintained and will act impartially. "Such favorable presumptions are constantly indulged in regard to legislative action." State *ex rel. v.* Mead, 71 Mo. 272.

It is at once apparent that no iron clad rule can fit every case. The assembly may well determine that the keeping of a dairy in the outskirts of a city where the population is sparse and the areas large would not be a nuisance whereas to permit a dairy in the

thickly populated portion of the city, or near a school house, church, or hospital, would seriously endanger the public health, and in the exercise of its plenary powers permit it in the one case, and prohibit it in the other, without being obnoxious to the criticism of partiality. Under the charter it is given legislative discretion in this matter. In our opinion the ordinance prescribed the limits and it was entirely proper and lawful to require every person desiring to erect or maintain a dairy to obtain permission by a proper ordinance and such an ordinance is the only defence to an action like this. City *v.* Howard, 119 Mo. 47.

We can see no more objection to such an ordinance than could be urged against the granting of a franchise to run a street railroad on a particular street.

A railroad laid in a street without authority is a nuisance and yet it has never been held that an ordinance to be valid must permit everybody to maintain railways in all the streets.

It is a matter within the authority of the assembly.

II.

As to the objection that the ordinance violates the 14th amendment to the Constitution of the United States, it is sufficient to say that it does not contravene that amendment because it operates upon all persons alike, and that every man holds his property subject to the maxim that he must so use it as not to injure his neighbor.

Nothing in that amendment has shorn the States of their police power to prohibit or regulate unwholesome trades and occupations. Slaughter House Cases, 16 Wall., 36; Tiedeman's State & Federal Control of Personal & Property, p. 731; *In re* Linahan, 72 Cal. 114; State *v.* Broadbelt, 89 Md. 565; 2 Kent Com. 340; City of St. Louis *v.* Howard, 119 Mo. 47; Eichenlaub *vs.* St. Joseph, 113 Mo. 395.

Nothing in the Constitution of the United States or of this State secures to any man the right to maintain a nuisance to the discomfort and peril of the health of his neighbor.

It is not deemed necessary to answer seriatim all the objections urged to the constitutionality of this ordinance. We have considered them all and are satisfied they are not tenable or sound. There is nothing retrospective in the application of this ordinance to defendant. It was adopted in 1896. He began without the permission of a proper ordinance to carry on and maintain this dairy at the premises mentioned in the complaint in 1898, long after the ordinance was in *froce*.

The ordinance is levelled at the maintenance of a dairy, the keeping of cows for the sale of milk, and the mere fact that the premises had once been so occupied prior to 1896, but subsequently abandoned for such a use, did not authorize defendant to start up a new dairy on said premises without the necessary condition pre-

cedent of a lawful ordinance. Accordingly we hold his conviction was proper and the judgment is affirmed.

JAS. B. GANTT.

Burgess, C. J., concurs in these views.

31 In the Supreme Court of Missouri, Court in Banc, October Term, 1901.

THE CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

Per curiam:

Upon a rehearing by the court in banc the foregoing opinion of Gantt, J., in division No. 2 is adopted by the court in banc.

Burgess, C. J., Robinson, Brace, Marshall and Valliant, J. J., concurring therein. Sherwood, J., dissenting and expressing his views in a dissenting opinion.

And afterwards to-wit, on the 1st day of March, 1902, the further following proceedings were had in said cause, viz.:

ST. LOUIS, Respondent,
vs.
JNO. G. FISCHER, Appellant.

Come now the said appellant by attorney, and files his motion for rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri. En Banc.

CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.
Case No. 9815.

Now comes appellant and moves the court for a rehearing and a reconsideration of this cause, for the following reasons, to-wit:

I.

(*a.*) The court has overlooked the fact that the allegation and proof do not correspond, in this:

"Allegata."—"Said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having
32 been obtained from the municipal assembly by proper ordinance, said dairy and cow stable *not having been in operation*

at the time of the approval of ordinance No. 18407, to-wit: April 6th, 1896."

See page 2 of appellant's original brief.

"*Probata.*—"*At the time of the approval of ordinance No. 18,407*, o said city and State, *said premises, buildings and stable were occupied and in use* by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable" etc.

See appellant's original brief p. 5.

See appellant's original brief point X, pp. 26–28.

See "Remarks" p. 5 *et seq.* of appellant's reply to respondent's brief.

(*b.*) The court has overlooked tha fact that the doctrine of strict construction must apply to sec. 5 of the ordinance and to the pleadings and proof thereunder, as heretofore stated.

See point XII, pp. 30–31, appellant's original brief.

See "Remarks" p. 5 *et seq.* appellant's reply to respondent's brief.

(*c.*) The court overlooked the fact that under the doctrine of strict construction, the municipal assembly *alone cannot enact* a *proper* ordinance.

See appellant's brief point XI, pp. 29–30.

(*d.*) The court overlooked the fact that the dairy and cow stable in question here, having been in operation at the time of the approval of ordinance No. 18,407, which was April 6, 1896, its owner had a vested right to continue it as such (subject only to the doctrine of *sic utere tuo*, etc.) or to lease or rent it to others as such, and of this right he could not be deprived except by due process of law. The ordinance could operate only as to dairies tobe erected, &c., in future. It was not levelled at dairies that *were in operation April 6, 1896*, which in section 5 of that ordinance constitute an ex-

33 ception and an exempted class.

Respectfully submitted.

LOUIS A. STEBER,
Att'y for Appellant.

St. Louis, Mo., Feb'y 28, 1902.

And afterwards, to-wit, on the 19th day of March, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent
v.
JOHN G. FISCHER, Appellant.

Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be and the same is hereby overruled.

And afterwards, to-wit, on the 30th day of June, 1902, the further following proceedings were had in said cause, viz:

In Vacation, June 30, 1902.

CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

Now at this day, there is presented to the Honorable G. D. Burgess, chief justice of the supreme court of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing it to appear at a Supreme Court of the United States on the 30th day of July, 1902, and a bond in the sum of one thousand dollars, which said writ of error is allowed, said citation signed, and said bond approved, ordered filed and made a part of the record herein.

Which said bond is in words and figures as follows, to-wit:

Know all men by these presents, that we, John G. Fischer as principal, and Henry Steinlage and Wm. Klasing, as sureties, are held and firmly bound unto the City of St. Louis, in the full
34 and just sum of one thousand dollars, to be paid to the said City of St. Louis, to which payment well and truly to be made, we bind ourselves, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at the October term, A. D. 1901, of the supreme court of the State of Missouri, in a suit depending in said court between The City of St. Louis, respondent, and John G. Fischer, appellant, judgment was rendered against the said John G. Fischer, appellant, as aforesaid, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of St. Louis, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now, the condition of the above obligation is such, that if the said John G. Fischer shall prosecute said writ to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

J. G. FISCHER. [SEAL.]
HENRY STEINLAGE. [SEAL.]
WM. KLASING. [SEAL.]

Sealed and delivered in presence of—
JAMES R. GRAY,
Clerk of the United States Circuit Court,
Eastern Division, Eastern Judicial District of Mo.

Approved by—
G. D. BURGESS,
Chief Justice.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

Before me, James R. Gray, clerk of the United States circuit court, eastern division eastern judicial district of Mo., personally appeared Henry Steinlage to me well known who upon oath states that he is worth over and above his indebtedness the sum of twenty thousand dollars and that he owns real property to that amount, subject to execution in the city of St. Louis, Missouri.

HENRY STEINLAGE.

Subscribed and sworn to before me this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
Clerk of the United States Circuit Court,
Eastern Division, Eastern Judicial District of Mo.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

Before me, James R. Gray, clerk of the United States circuit court, eastern division eastern judicial district of Mo., personally appeared William Klasing to me well known who upon oath states that he is worth over and above his indebtedness the sum of twenty thousand dollars, and that he owns real property to that amount, subject to execution in the city of St. Louis, Missouri.

WM. KLASING.

Subscribed and sworn to before me this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
Clerk of the United States Circuit Court,
Eastern Division, Eastern Judicial District of Mo.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

I *I* do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine; I further certify that said bond is good and sufficient.

Witness my hand and seal this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
Clerk of the United States Circuit Court,
Eastern Division, Eastern Judicial District of Mo.

And afterwards to-wit, on the 16th day of July, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
vs.
JNO. G. FISCHER, Appellant.

Now at this day comes the said appellant by attorney, and files his assignment of errors in this cause to the Supreme Court of the United States.

Which said assignment of errors is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, October Term, 1901.

CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant. } Cause No. 9815.

To the honorable the supreme court of the State of Missouri:

Now this day comes John G. Fischer, the above named appellant and defendant, and prays for a writ of error, in the above entitled cause, to the honorable the Supreme Court of the United States, and for error makes the following assignments:

First. That the court erred in holding and declaring that section 5 of city ordinance No. 18407 of the city of St. Louis, State of Missouri, did not contravene and was not in conflict with the fourteenth amendment to the Constitution of the United States, in these particulars, to-wit: that "No State shall make or enforce any law
37 which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" that this matter and contention was by defendant properly presented by written plea and argument, (and before trial had on the facts) in the court of first instance, wherein the original complaint was first filed and presented against him, viz: the second district police court of the city of St. Louis; that on being overruled in said matters in said police court and being therein convicted, defendant, (appellant herein,) appealed, for trial *de novo*, said cause to the court having appellate jurisdiction thereof, under the law, to-wit, the court of criminal correction of the city of St. Louis, which exists as a court of record; that again, in said court of criminal correction, defendant (appellant herein) by leave of court refiled said written plea, which upon presentation and argument was by said court overruled, to which action of the court defendant duly saved his exceptions; that after trial and conviction upon the facts presented to said court, defendant filed his motion for a new trial, and his motion in arrest of judgment, in each of which motions the defendant again presented to said court of criminal correction his contention

that the said section 5 of the ordinance of the city of St. Louis, as aforesaid, was in violation and contravention of the fourteenth amendment to the Constitution of the United States, in each of its parts; that defendant again saved his exceptions to the overruling of his said motions; that after conviction and judgment against him in the said court of criminal correction, and the saving of his exceptions thereto, defendant again appealed to this honorable court, the supreme court of Missouri, and to said court, en banc, again un-cessfully presented his various pleas as made below, and urged same by printed brief and oral argument, and that the judgment of the lower and trial court, was by the said supreme court, en banc, affirmed.

38 Wherefore, defendant (appellant herein) still believing, asserting and complaining that the said section 5 of the city ordinance as aforesaid, as fully set forth in the records of this cause, is in violation and contravention of each and all of the parts of the fourteenth amendment to the Constitution of the United States, respectfully prays that a writ of error may be granted, awarded and accorded to him, to the Supreme Court of the United States of America, for further hearing, consideration and judgment therein.

JOHN G. FISCHER,
Defendant and Appellant,
By LOUIS A. STEBER,
His Attorney.

STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had and made in the supreme court of the State of Missouri in the case of City of St. Louis *vs.* John G. Fischer, as full and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Jefferson, this 16th day of July, A. D. 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk,*
By SPEED MOSBY, *D. C.*

Endorsed on cover: File No. 18,803. Missouri supreme court. Term No. 204. John G. Fischer, plaintiff in error, *vs.* The City of St. Louis. Filed January 29, 1903.

(18,803.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 204.

JOHN G. FISCHER,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OF FACTS.

This proceeding was instituted in the Police Court of the City of St. Louis, for the violation of Section 5 of Ordinance No. 18407 of said City, which reads as follows:

Section 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this

city without first having obtained permission so to do from the Municipal Assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

The City Attorney's complaint or statement as filed in the Police Court is as follows:

John G. Fischer to the City of St. Louis, Dr.

To five hundred dollars, for the violation of an ordinance of said city entitled, "An Ordinance in Revision of the ordinances of the City of St. Louis, and to establish new ordinance provisions for the government of said City," being ordinance No, 18,407, Section 5, approved April 6th, 1896.

In this, to-wit: In the City of St. Louis, and State of Missouri, on the 15th day of November, 1898, and on divers other days and times prior thereto, the said John G. Fischer, being the

(1) Occupant of the premises known as 7208 and 7210 North Broadway, in said city, did then and there erect, build and establish on said premises a dairy and cow stable, without first having obtained permission so to do from the Municipal Assembly by proper ordinance;

(2) And furthermore, said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having been obtained from the Municipal Assembly by proper ordinance, said dairy

and cow stable not having been in operation at the time of the approval of Ordinance No. 18,407, to-wit: April 6th, 1896, contrary to ordinance in such case made and provided.

Defendant, in the Police Court, filed his motion to quash, and among other reasons given therefor, contended that Section 5 of the ordinance was in violation of the XIV Amendment to the Constitution of the United States. The motion was overruled.

Judgment being against defendant and a fine imposed, the case was appealed by defendant to the St. Louis Court of Criminal Correction, a court of record, having appellate jurisdiction in such cases, for a trial *de novo.*

The motion to quash was again argued and submitted to that court, and the Federal question again argued and presented, but the motion was overruled and exceptions were noted and saved.

As the facts were undisputed counsel submitted an agreed statement for the judgment of the Court, as follows:

AGREED STATEMENT OF FACTS.

It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, the City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the 16th day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the City of St. Louis, State of Missouri, upon which

premises, at said time, stood a dwelling house and a frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of Ordinance No. 18,407, of said city and State, said premises, buildings and stable were occupied and in use by a certain party, other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to the premises Nos. 7208 and 7210 North Broadway, said city, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said 16th day of November, 1898, without first having obtained permission so to do from the Municipal Assembly by proper ordinance as provided by Section 5, of Ordinance No. 18,407, of City of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked "Exhibit A," which is attached to and made a part of this agreed statement of facts, is a

full, true and correct copy of said Ordinance No. 18,407, and may be considered in evidence in this cause.

The Court of Criminal Correction found against defendant and imposed a fine.

The defendant filed his motions for a new trial and in arrest of judgment, again presenting the Federal question, that the section of the ordinance sued on, was in violation of the Fourteenth Amendment of the Constitution of the United States in all its parts, but both of said motions were overruled.

Defendant also, at the same time, filed his motion for judgment *non obstante veredicto*, on the undisputed facts, which was also overruled.

Defendant then appealed to the Supreme Court of Missouri, where the Federal question was again presented, and the judgment of the lower court was affirmed.

The cause is now brought to this Honorable Court on writ of error for its review.

CHARTER POWERS OF THE CITY OF ST. LOUIS,

IN FORCE AT THE TIME OF THE ALLEGED VIOLATION OF THE ORDINANCE.

"The Mayor and Assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of this State, or of this Charter, * * * to * * * prohibit the erection of * * * cow stables and dairies, * * * within prescribed limits, and to remove and regulate the same."

Vol. 2, Rev. Stat. of Mo. A. D. 1899, at page 2486, Art. 3, Sec. 26, Par. sixth.

"Finally, to pass all such ordinances, not inconsistent with the provisions of this Charter, or the laws of the State, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars;" * * *

Vol. 2, Rev. Stat. of Mo., A. D. 1899, at page 2488, Art. 3, Sec. 26, Par. fourteenth.

"No ordinance passed by the Assembly, * * * shall take effect or be in force until ten days after its approval." * * *

Vol. 2, Rev. Stat. of Mo., A. D. 1899, at page 2483, Art. 3, Sec. 21.

BRIEF.

I.

Section 5 of the ordinance (the only one in issue) is in violation of the XIVth Amendment to the Constitution of the United States, in this:

(*a*) Nor shall any State deprive any person of life, liberty or property without due process of law.

(*b*) Nor deny to any person the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356.

II.

The Supreme Court of the United States will make its own interpretation of the ordinance where its validity is assailed as in violation of the United States Constitution.

Yick Wo v. Hopkins, *supra*.

It will determine finally whether legislation or action under State authority is due process of law.

State v. Sponagle, 45 W. Va. 415;
" " 43 L. R. A. 727.

III.

The City Attorney's statement (if so properly termed) under which the cause was tried, is in two counts:

(1) That the defendant did erect, build and establish a dairy and cow stable, and

(2) That he did maintain said dairy and cow stable, which had not been in operation at the time of the approval of the ordinance No. 18,407, to-wit, April 6th, 1896.

All without the permission of the Municipal Assembly by proper ordinance.

(*a*) This is a denial of the equal protection of the laws.

Yick Wo v. Hopkins, *supra.*

(*b*) The complaint and the ordinance are not in consonance with the charter provision which prohibits the "erection" of dairies and cow stables within "prescribed limits." If the "erection" has been in positive violation of law, then the charter gives power to "remove and regulate same," to-wit: The "erection" or building which was unlawfully erected.

Eichenlaub v. St. Joseph, 113 Mo. 395.

(*c*) For "the prescribed limits" it substitutes the "permission" of the Municipal Assembly, which cannot be done.

State v. Mahner, 43 La. Ann. 496, 500.

(*d*) The discretion of the Municipal Assembly being exercised against the dairyman's right to use the property—deprives him of his property without due process of law, and by granting a right so to do to the one party and refusing it to another, without the intervention of rules of law,—denies to the one not in favor, the equal protection of the laws.

Yick Wo v. Hopkins, *supra.*

(*e*) The use of one's property is as much property as the property itself.

City of St. Louis v. Hill, 116 Mo. 527, 533–4;
City of St. Louis v. Dorr, *et al.*, 145 Mo. 466, 485, 501.

IV.

(*a*) The dairy and cow stable had been lawfully erected prior to, and was in lawful operation at, the time of the passage of Section 5 of the ordinance in controversy. (See stipulated facts.) It was therefore "property" in the broadest sense of the term.

St. Louis v. Hill, *supra.*
St. Louis v. Dorr, *et al.*, *supra.*

(*b*) The right of use and occupation was a vested right, which could not be arbitrarily or capriciously destroyed at the uncontrolled will of the local authorities.

Yates v. Milwaukee, 77 U. S. 497, 504–5.

(*c*) The question of nuisance does not enter into this case.

Yates v. Milwaukee, *supra;*
River Rendering Co. v. Behr, 77 Mo. 91.

(*d*) A dairy or cow stable is not a nuisance *per se.*
St. Louis v. Schnuckelberg, 7 Mo. App. 536, 540–1.

V.

(*a*) The St. Louis Charter power is to "prohibit" the erection of cow stables and dairies "within prescribed limits." If the prohibition applies to the entire city why use the words "prescribed limits?" These

words imply a limitation within the bounds of the city, and mean definite, named, designated boundaries or localities as, for instance, found

In re Linahan, 72 Calif. 114.

The word "limit" most obviously and normally designates a bound, "a restraint, a circumspection, a boundary."

Casler v. Ins. Co. 22 N. Y., *loc. cit.* 429.

"Prescribe" means to "ordain," "appoint," "define authoritatively."

See dictionaries generally.

(*b*) The same charter gives power to "regulate, restrain or prohibit the erection of wooden buildings within the prescribed limits." See:

2 Rev. St. of Mo., A. D. 1899, at p. 2488; being Art. 3, Sec. 26, par. twelfth of Charter.

Could the farmer, in the farming districts of the city, be compelled to obtain the permission of the Municipal Assembly to erect a wooden building on his farm, far removed from other human habitations? Must the fact of the erection be left to the whim, caprice or favoritism of this legislative body, or should it be made to conform to general regulations applying to all persons of the same class?

(*c*) If the power be to "regulate," then the regulation must be uniform and apply to all of the same class. Does the XIVth Amendment permit neighbor **A** to be regulated and neighbor **B** to be prohibited, just because **A** may have more influence, political, religious,

social or otherwise with that body? Is there any test of fitness prescribed?

(*d*) In the liquor or dramshop license cases and other cases, the test may be committed to some officer or officers to judge of the personal fitness or character of the applicant. In this case the test is to the establishment itself. In other words **B** may want to use his farm for dairy purposes and build thereon a cow stable in conformity with all the building regulations. He is refused permission without valid reasons of any kind. **A**, with such permission, may erect and operate his cow stable in the choicest residence district of the city.

If this is not violative of the XIVth Amendment, what is it? Yet under the ordinance this can be done.

Yick Wo v. Hopkins, *supra*;
Boyd v. Board of Councilmen, 77 S. W. (Ky.) 669.

(*e*) If Sec. 5 of the ordinance is under the charter power to "prohibit" it must apply to all persons alike and without discrimination. The same rule applies to the power to "regulate." You cannot by special ordinance "prohibit" "**B**" and at the same time "regulate" "**A**."

Tugman v. Chicago, 78 Ill. 405, 409;
Hibbard v. Chicago, 173 Ill. 91, 98;
St. Louis v. Russell, 116 Mo. 248, 257–8;
State v. Walsh, 136 Mo. 400, 406;
Shreveport v. Robinson, 51 La. Ann. 1314;
Town of Crowley v. West, 52 La. Ann. 526, 534;
Cooley Const. Lim. (6th Ed.) p. 137, Note 1;
" " pp. 481–483.

(*f*) There is a substantial difference between "prohibition" and "regulation."

Chillicothe v. Brown, 38 Mo. App., p. 617;
State v. Burgdoerfer, 107 Mo. 1, 24–26;
State v. Mott, 61 Md. 297, 308–9;
Merced County v. Fleming, 111 Calif. 46, 50;
Los Angeles v. Hollywood Cemetery Association, 124 Calif. 344, 349.

(*g*) Whatever charter power be relied upon, whether it be to "prohibit" or to "regulate," it must be by general laws, or ordinances, applying to all alike, of the same class. The exercise of the power, in any given particular or individual case, cannot be delegated to any individual, officer, board, committee, or even to the municipal legislative body itself.

Yick Wo. v. Hopkins, *supra;*
St. Louis v. Russell, 116 Mo. *loc. cit.*, 256, 258;
Barthet v. New Orleans, 24 Fed. 564;
In re Quong Woo, 13 Fed. 229;
State v. Mahner, 43 La. Ann. 496;
Newton v. Belger, 143 Mass. 598;
Richmond v. Dudley, 129 Ind. 112;
State v. Dubarry, 44 La. Ann. 1117;
State v. Tenant, 110 N. C. 609;
Tugman v. Chicago, 78 Ill. 409;
Baltimore v. Radecke, 49 Md. 217;
Boyd v. Board of Councilmen, *supra;*
Cooley Const. Lim. (6th Ed.) p. 137.

VI.

(*a*) Section 5 of the ordinance does not condemn all dairies or cow stables, but only such as are "erected"

without the permission of the Municipal Assembly. This body possesses only the delegated powers. The legislature, which is the representative of, what might be termed, the sovereign power, cannot, constitutionally, declare a given use of a particular property as harmful or as a nuisance. This would be exercising a judicial function.

Quintini v. Bay St. Louis, 64 Miss. 483;
Tiedeman on Police Powers, Sec. 122a, p. 426;
Wood on Nuis. 3rd Ed. Sec. 744, p. 976;
Mayor, Etc. v. Thorne, 7 Paige (N. Y.) 261;
Hutton v. City of Camden, 39 N. J. L. 122, 130;
New Orleans v. Blineau, 3 La. Ann. 689;
State v. Mott, 61 Md. 297, 308;
Evansville v. Miller, 146 Ind. 613, 620;
Eden v. The People, 161 Ill. 296, 308;
In re Jacobs, 98 N. Y. 98, 111.

(*b*) The judicial powers cannot be delegated as attempted in Section 5 of the ordinance.

Cooley Const. Lim. (6th Ed.) p. 504;
" " " " p. 137.

(*c*) No such power of confiscation, without any judicial ascertainment of the fact of harmfulness, is given by the charter.

St. Louis v. Schnuckelberg, *supra.*

VII.

(*a*) The ordinance is not only leveled at dairies or cow stables from which milk is sold or delivered to the public, but applies as well to the householder who may want to keep one or two cows for milk, butter and cheese for his own family. Ordinances restricting pri-

vate rights in so sweeping a degree have been declared unreasonable and oppressive.

The Stockton Laundry Case, 26 Fed. 611, 612;
St. Louis v. Heitzberg, 141 Mo. 375, 388.

(*b*) The theory of our Government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, legislative and the judicial branches of these governments are all of limited and defined power.

Curry v. District of Columbia, 14 App. D. C. 423, 439, 440;
Loan Association v. Topeka, 20 Wall. 622;
Minnesota v. Barber, 136 U. S. 313, 320;
R. R. Co. v. Chicago, 166 U. S. 226, 237;
State v. Loomis, 115 Mo. 307, 313;
R. R. Co. v. State, 47 Neb. 549, 573.

VIII.

The personal liberty of the citizen and his right of property cannot thus be invaded under the guise of a police regulation.

Ex parte Sing Lee, 96 Calif. 354, 358;
In re Jacobs, 98 N. Y. 98, 109;
Dill. Munc. Corp., 4th Ed., Sec. 374, pp. 447–9;
River Rendering Co. v. Behr, 77 Mo. 91, 98–99;
State v. Julow, 129 Mo. 163, 177;
State v. Walsh, 136 Mo. 400, 407;
Eden v. The People, 161 Ill. 296, 308;
Minnesota v. Barber, 136 U. S. 313, 320;
Yick Wo v. Hopkins, *supra;*
Allgeyer v. Louisiana, 165 U. S. 578, 589;
U. S. v. Sweeney, 95 Fed. 434, 450–1.

IX.

(*a*) Section 5 of the ordinance being highly penal in its nature and consequences, must be subject to strict construction. This is the rule in Missouri.

St. Louis v. Dorr, 136 Mo. 370, 375;
St. Louis v. Robinson. 135 Mo. 460, 470.

Its provisions cannot be carried beyond its express terms.

Town of Pacific v. Seifert, 79 Mo. 210, 215.

(*b*) "Nothing can be taken by intendment in such a prosecution."

St. Louis v. Robinson, *supra*;
State v. Schuchmann, 133 Mo. 111, 117.

(*c*) "When doubts arise concerning their interpretation, such doubts are to weigh only in favor of the accused."

State v. Schuchmann, *supra*;
Canton v. Dawson, 71 Mo. App. 235, 239;
State v. Bryant, 90 Mo. 534, 537–8.

(*d*) "Equitable constructions are never given to mere arbitrary regulations of public policy."

Westport v. Mastin, 62 Mo. App. at p. 658.

X.

(*a*) No case has been made against the defendant under the *allegata* and *probata*. Where the facts are undisputed, where a man is punished for a matter not complained of, he is deprived of his due process of law. The first count charges that defendant did "erect, build and establish." The proof shows that he did not

"erect" or "build." He did not "establish" which means "to found originally"—"the act of originating."

Ketchum v. Buffalo, 14 N. Y. *loc. cit.* 361;
See also Webster's Dictionary.

(*b*) The second count cannot be upheld. The Charter forbids the "erection" after the passage of the ordinance. It was in existence before. Its erection was one thing, its use after that an entirely different one.

St. Louis v. Dorr, 136 Mo. *loc. cit.* 375.

(*c*) The Municipal Assembly cannot limit the use of this buiding and force the owner to convert it to other uses to which it was unfit and, to that extent, deprive the owner of his property, and the use of it, without due process of law.

The Stockton Laundry Case, 26 Fed. 611, 615;
Hutton v. Camden, 39 N. J. *loc. cit.* 130.

Respectfully submitted.

J. E. McKeighan and
Louis A. Steber,
Attorneys for the Plaintiff in Error.

19227

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 204.

JOHN G. FISCHER,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

No. 18,803.

STATEMENT.

This cause comes here on writ of error to the Supreme Court of Missouri.

The cause originated as a civil proceeding before a police court in the city of St. Louis, where defendant (here plaintiff in error), was fined for a violation of city ordinance 18407, hereinbefore set out. Upon his appeal to the St. Louis Court of Criminal Correction the cause was tried *de novo* on an agreed statement of facts, hereinafter set out, and the court again found defendant (here plaintiff in error) guilty of a violation of said ordinance and he was fined one hundred dollars and costs. From this decision

he appealed to the Supreme Court of Missouri (the court of last resort under the State law), where the decision of the lower court was affirmed in an opinion by the court *in banc* (reported as City of St. Louis vs. Fisher, 167 Missouri, pages 654-665), and every contention of appellant ruled against him.

In all stages of the litigation plaintiff in error contended that said ordinance was void, amongst other reasons, because in conflict with the fourteenth amendment of the United States Constitution, and the case comes here on that ground, which is now the only point open for discussion.

The defendant in error is a municiapl corporation organized in pursuance of the provisions of the Constitution of Missouri, set out therein in Article IX, Sections 20 to 25 (to be found in Revised Statutes of Missouri for 1899, pages 102, 103, slightly amended in particulars immaterial here in 1901), which provisions granted to St. Louis the right to adopt a Charter, subject only to the limitation that it should be subject to and in harmony with the Constitution and laws of the State.

Of such a charter the Constitution provides the courts take judicial notice (Constitution of Missouri, Article IX, Section 21).

Pursuant to this grant of power, the people of St. Louis adopted its present Charter, which took effect October 22, 1876, and which has all the force and effect of a Charter emanating from the General Assembly, and which amongst other things, gave it the power by ordinance enacted through its Mayor and Municipal Assembly (the latter consisting of an upper house or Council, and a lower house or House of Delegates)

"to secure the general health of the inhabitants by any measure necessary, * * * to *prohibit the erection* of soap factories, stock-yards and slaughter houses, pig pens, *cow-stables and dairies,* coal oil and vitriol factories within prescribed limits, and to remove and *regulate the same;* and to regulate or prevent the carrying on of any *business which may be dangerous or detrimental to the public health,* * * * and to declare, prevent and abate *nuisances on public or private property* and the causes thereof * * *" (Charter of St. Louis, Article III, Section 26, subdivision sixth.)

Also "finally, to pass all such ordinances not inconsistent with the provisions of the Charter, or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city * * * and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars." (Charter, Article III, Section 26, subdivision fourteenth.)

In pursuance of the above enumerated powers (especially Article III, Section 26, subdivision sixth) the city duly enacted said ordinance, numbered 18407, approved April 6, 1896. The fifth section of said ordinance only is here attacked, hence we reproduce here only the title of the ordinance, and section fifth thereof, which are as follows:

"AN ordinance to regulate cow stables and dairies within the corporate limits of the city of St Louis, prescribing how they may be maintained, defining when they shall be deemed a nuisance, providing for their inspection by veterinary surgeons and sanitary officers, and fixing the salaries of the veterinary surgeons. Also, to repeal section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three, of article eight of chapter fourteen of the revised ordinances of the city of St. Louis of one thousand eight hundred and ninety-three.

Sec. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the Municipal Assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

The case was tried upon an agreed statement of facts in all the State courts, which is as follows:

"It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, the City of St. Louis, is a Municipal Corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the 16th day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the City of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of Ordinance No. 18407, of said City and State, said premises, buildings and stable were occupied and in use by a certain party other than this defendant for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said City and State. Sometime in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling

house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said City, on to the premises Nos. 7208 and 7210 North Broadway, said City, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said 16th day of November, 1898, without having first obtained permission so to do from the Municipal Assembly by proper ordinance as provided by Section 5, of Ordinance No. 18407, of City of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked 'Exhibit A,' which is attached to and made a part of this agreed statement of facts, is a full, true and correct copy of said Ordinance No. 18407, and may be considered in evidence in this cause."

The plaintiff in error now brings the cause here to review the decision of the Missouri Supreme Court, as hereinbefore stated, on the ground that said ordinance is unconstitutional because in conflict with that part of section one of the fourteenth amendment of the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

(a) No question is open for the consideration of this court save whether the ordinance in question violates the Fourteenth Amendment to the United States Constitution. On all other points the plaintiff in error is concluded by the ruling of the State Supreme Court.

Barbier vs. Connolly, 113 U. S. 27, 29, 30, 32.
Wilson vs. Eureka, 173 U. S. 32, 35.
Crowley vs. Christensen, 137 U. S. 86, 92, 94.
Gundling vs. Chicago, 177 U. S. 183, 185.

(b) The only ground upon which plaintiff in error can plausibly urge the alleged unconstitutionality of the ordinance is his contention that it confers arbitrary power on the municipal assembly to grant or refuse permission to operate a dairy. And as to this the plaintiff in error is not in a position to raise the question. He made no application for a permit or license and of course has not been refused one. *Non constat* that the assembly would have refused an application. Whether the discretion of the assembly is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused permission.

Gundling vs. Chicago, 177 U. S. 183, 186.

II.

(a) But, assuming that the question may be raised by plaintiff in error, the requirement of the ordinance that he,

like every other person similarly situated, must first obtain the permission of the Municipal Assembly before establishing or maintaining a dairy within the limits of the City of St. Louis, does not operate as a violation of the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

Gundling vs. Chicago, 177 U. S. 183, 186.
Wilson vs. Eureka, 173 U. S. 32 and cases there cited.
Davis vs. Massachusetts, 167 U. S. 43, 48.
St. Louis vs. Galt, 77 Southwestern (Missouri Sup. Court, Nov. 25, 1903) 876, 879.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Ex parte Fiske, 72 Cal. 124, 126 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356).
Slaughter House Cases, 16 Wallace 36, 80.
Barbier vs. Connolly, 113 U. S. 27, 32.
Crowley vs. Christensen, 137 U. S. 86 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds in point here).

(b) The charter provisions (which are perfectly lawful—see Point III) confer on the city *express* power to *prohibit* altogether the erection or maintenance of cow stables and dairies as well as to remove and *regulate* the same. Under these provisions it is competent to impose, instead of absolute prohibition, the lesser restriction, upon all persons desiring to erect or maintain a dairy, of first obtaining permission so to do from the municipal assembly and mayor by ordinance. The maintenance of dairies and cow stables within the city limits is not an absolute right, but a privilege, and whether under the individual circumstances of each case the operation of a dairy in the particular locality may be advantageous or injurious to

the public is a question the determination of which is properly left to the discretion of the Municipal Assembly, and the ordinance is not for that reason void as conferring an arbitrary and unregulated power.

Wilson vs. Eureka, 173 U. S. 32, 35-37.

Davis vs. Massachusetts, 167 U. S. 43, 48 ("The right to absolutely exclude all right to use, necessarily inc'udes the authority to determine under what circumstances such use may be availed of, as the greater includes the less." p. 48.)

St. Louis vs. Fischer, 167 Mo. 654, 662.

Gundling vs. Chicago, 177 U. S. 183, 186-188.

Crowley vs. Christensen, 137 U. S. 86, 92 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds applicable to this case).

Commonwealth vs. Parks, 155 Mass. 531, 532 ("What a municipality may forbid altogether, it may forbid conditionally, unless its written permission is obtained beforehand").

Quincy vs. Kennard, 151 Mass. 563 (prohibiting keeping of swine without the permission of the board of health first obtained).

In re Flaherty, 105 Cal. 558, 562.

Ex parte Fiske, 72 Cal. 124, 127-128.

Easton vs. Covey, 74 Md. 262 (distinguishing Mayor vs. Radecke 49 Md.) relied on by plaintiff in error.

Love vs. Judge, 128 Mich. 545 (distinguishing the Frazee case, 63 Mich. 396, relied on by plaintiff in error).

St. Louis vs. Howard, 119 Mo. 47.

St. Louis vs. Weber, 44 Mo. 547, 550.

State *ex rel* vs. Holt, 39 Mo. 521, 524.

Perry vs. Salt Lake, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446.

Hine vs. New Haven, 40 Conn. 478.
Commonwealth vs. Davis, 162 Mass. 510.

See also State *ex rel* vs. Schweickardt, 109 Mo. 496, 514 (holding that under many circumstances privileges may be granted by statutes or ordinances to specified individuals without violating any constitutional privilege, and upholding an ordinance to that effect: p. 514).

(c) Where the determination of the question whether the pursuit of a certain occupation, which may or may not be a nuisance according to conditions and circumstances, is left to the discretion of the Municipal Assembly, the presumption is indulged by the courts that such body will make the proper investigation and act impartially, not that it will favor one and discriminate against another, or exercise its powers for purposes of profit or oppression. Such favorable presumptions are constantly indulged in regard to legislative action.

City of St. Louis vs. Fischer, 167 Mo. 654, 663.
City of St. Louis vs. Howard, 119 Mo. 47, 50.
In re Flaherty, 105 Cal. 558, 562.
Ex parte Fiske, 72 Cal. 125, 127.
Perry vs. Salt Lake City, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446, 448.

See also Soon Hing vs. Crowley, 113 U. S. 703, 710 ("The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments").

(d) The possibility of the abuse of legislative power

does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist.

> Powell vs. Pennsylvania, 127 U. S. 678, 686.
> Williams vs. Mississippi, 170 U. S. 213, 225.
> Verdin vs. St. Louis, 131 Mo. 26, 130, per Sherwood, J., citing Powell vs. Pennsylvania *supra.*
> Crowley vs. Christensen, 137 U. S. 86 ("As in many other cases, the officers may not always exercise the power [to grant certain licenses] conferred on them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States": p. 91-92).

There must always be lodged somewhere and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.

> Powell vs. Pennsylvania, *supra,* p. 685.
> Yick Wo vs. Hopkins, 118 U. S. 356, 370.

(e) There is no hint or suggestion that discrimination or injustice is, or is intended to be, exercised under the ordinance in question.

As it does not appear upon the face of the ordinance, or from any facts in evidence or of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, or that there is any unjust discrimination, the legislative determination of the questions

of public policy requiring its enactment is conclusive upon this court and forms no subject for Federal interference.

Powell vs. Pennsylvania, 127 U. S. 678, 684.
Gundling vs. Chicago, 177 U. S. 183, 187-188.
Capital City Dairy Co. vs. Ohio, 183 U. S. 238, 246.
State vs. Layton, 160 Mo. 474, 498.

III.

(a) The ordinance in question is a valid exercise of the police power expressly delegated by the State to the City. The Fourteenth Amendment was not designed to interfere with the exercise of the police power by the States, and nothing in that amendment has shorn the States of their police power to prohibit or regulate trades and occupations which are or may be unwholesome, nor of regulating the use of property so as to guard against a use which is injurious to the community.

Davis vs. Massachusetts, 167 U. S. 43, 47.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Slaughter House Cases, 16 Wallace, 36, 62, 81.
Powell vs. Pennsylvania, 127 U. S. 678, 683.
Holden vs. Hardy, 169 U. S. 366, 392.

(b) The establishment and operation of dairies and cow stables within the limits of a crowded metropolis is the pursuit of an occupation that is not necessarily harmless and unobnoxious in its nature, but one that may be or may become offensive, obnoxious and unsanitary to the community; its prohibition (*a fortiori* regulation) is within the police powers of the State, which the State may, and in this case has, delegated to the municipality. Even if the power had not been conferred (as it has been) by

express provision of the Charter, yet the ordinance in question would have been a valid exercise of the Police Power under the General Welfare Clause (Art. III, sec. 26, par. 14). The police power is universally conceded to include everything essential to the public safety, health, comfort and morals; and beyond this the State may interfere wherever the public interests require it, and in this particular (while its determination of what is a proper exercise of the police powers is not conclusive, but subject to judicial supervision) a large discretion is necessarily vested in the legislative body to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, nor to confiscate property under the guise of a police law, yet a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice not only in the subject matter, but in the means employed.

Lawton vs. Steele, 152 U. S. 133, 136, 140.

Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.

St. Louis vs. Galt, 77 Southwestern 876, 879 (Sup. Court Missouri, Nov. 25, 1903, not yet officially reported).

State vs. Broadbelt, 89 Md. 565, 577, 586 (upholding police regulations as to dairies and discussing numerous authorities, State and Federal).

Ferrenbach vs. Turner, 86 Mo. 416, 420 ("The courts ought not to interfere with municipal bodies in the legitimate exercise of those powers by which the peace, health and comfort of the inhabitants are secured," p. 421).

Crowley vs. Christensen, 137 U. S. 86, 89 (See also p. 91 "A business attended with danger to the community may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on. * * * It is a matter of legislative will only").

Gundling vs. Chicago, 177 U. S. 183 (p. 188: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference").

In re Linehan, 72 Cal. 114 ("The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits may be detrimental to health and dangerous to public safety," p. 116).

Tiedeman on State and Federal Control of Persons and Property (1900), vol. 2, p. 730, sec. 145 (pointing out that the legislature may prohibit acts or trades as unwholesome or annoying, which the courts in the absence of statutes would hold permissible; and that "granting that the act or trade produces discomfort or injury to health, it is ultimately a legislative question whether the public welfare requires the imposition of this burden." Dairies are within this range: *ib.* p. 731).

Parker and Worthington on Public Health and Safety (1892), sec. 254, pp. 291-292: ("The power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them; they may be entirely prohibited within the corporate limits, though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate' unless the trades or occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant it would be a reasonable and proper *regulation* to prohibit the carrying on, without the consent of the local authorities of any trade or occupation which however lawful and innocuous in itself *may become* in its ordinary exercise a public nuisance.")

(c) Stricter police regulations are essential to the welfare and safety of a crowded metropolis than are required in the sparsely peopled portions of the country, and which would be wholly unnecessary and intolerable in the latter. Every man who selects urban life necessarily gives up cer-

tain natural rights that would pertain to life in the country.

St. Louis vs. Galt, *supra.*
Ex parte Cheney, 90 Cal. 617, 620.

"The tendency of modern development is in the direction of greater rather than more restricted police power, and necessarily so in order to meet the new dangers and increase of old dangers constantly occurring as natural incidents of advancing civilization."

Valliant, J., in Westport vs. Mulholland, 159 Mo. 86, 94, quoting from a Wisconsin opinion.

"Changing civic conditions will justify the permission of an evil or nuisance at one time, and call for its suppression at a later day. * * * The same experience is met with in the keeping of cows, pigs, and other animals in small towns, on the premises of one's dwelling. This may be permitted in a town which is sparsely settled and large yards surrounding each dwelling, without endangering the public health to any very serious degree. But when the town becomes more thickly settled, and the large grounds are fast being divided into twenty-foot lots, the keeping of such animals on the premises becomes a serious nuisance, which may be restricted or prohibited altogether."

Tiedeman on State and Federal Control of Persons and Property (1900), Vol. 2, pp. 730, 731.

ARGUMENT.

Constitutionality of Ordinance Is the Only Question.

The ordinance in question was upheld against every contention made by the plaintiff in error by the highest tribunal in the State. This puts to rest every point raised except the unconstitutionality of the ordinance on the ground of its violation of the Fourteenth Amendment.

This court will therefore not consider the contention that the ordinance does not apply to the premises in question, which at one time had been used by another than plaintiff in error for dairy purposes with permission by the Assembly, but were then abandoned for dairy purposes for six months, and thereafter were sought to be occupied by plaintiff in error again for a dairy without a new permit, he simply moving his cows there from another locality. The State court held that once having been abandoned, the status as dairy premises was lost and could not be restored without permission anew (167 Mo. 665). Even if this ruling were reviewable, it is so obviously correct (since the conditions and surroundings may meanwhile have changed) that it requires no argument in this court.

The same is true as to the proper interpretation of the Charter on the point whether the authority therein given to prohibit "within prescribed limits" may extend to the entire city limits. The interpretation of the State court on this point is obviously correct, but at all events is not a subject for review here.

So, also, for the same reasons the question whether there is a delegation to the municipality of the State power to

prohibit or regulate the operation of dairies, is not here open for argument.

There is nothing for this court therefore except to say whether the ordinance is in violation of the Fourteenth Amendment (and even on that point it is debatable whether plaintiff in error can be heard, since he has never been denied permission by the Assembly—see Point I of antecedent brief).

Dignity of the Ordinance as a Law.

In discussing the constitutionality of this ordinance it is to be borne in mind that the same principles and considerations apply as in the case of a statute passed by the State legislature.

As appears in our statement, the State Constitution provides for the organization of the City of St. Louis by charter; the Charter provisions (except if inconsistent with the Constitution or laws of the State, which, as decided by the State Supreme Court, is not the case here, and which decision is conclusive on that point), are direct delegations of State power to the municipality, and the ordinances enacted by the Municipal Assembly in pursuance thereof, so long as they are in the legitimate sphere of municipal affairs, are entitled to the same force and effect and the same intendments and discretionary scope as are accorded to enactments of the General Assembly.

St. Louis vs. Foster, 52 Mo. 513 (where the court says, p. 515: "A city council is a miniature general assembly, and their authorized ordinances have the force of laws, passed by the legislature of the State.")

Verdin vs. St. Louis, 131 Mo. 26, 117-118 (Sher-

wood, J., quoting the last extract, and referring to other similar decisions placing ordinances and statutes on the same plane, on these questions).
Barber Asphalt Co. vs. French, 158 Mo. 534, 547 (atfirmed 181 U. S. 324).
St. Louis vs. Fischer, 167 Mo. 654, 660.
Kansas City vs. Oil Co., 140 Mo. 458, 467 *et seq.*
State ex rel vs. Lindell Ry., 151 Mo. 162.

The Ordinance Is a Valid Police Law.

We defer for a moment the consideration of the charge that the *manner* of the regulation or *quasi* prohibition provided in this ordinance confers unregulated arbitrary power on the Municipal Assembly not warranted by law, in order to first call attention that the *right itself* of the State (here acting through the city) to regulate, and even, if the point were involved here, to prohibit altogether, *within the limits of the city,* the operation of dairies, admits of little doubt. The authority in the Charter is conferred in the same clause which refers to subjects of a similar nature—"soap factories, stock-yards, slaughter houses, coal oil and vitriol factories," etc., and suppression of nuisances. The ordinance is within the legitimate exercise of the Police Power of the State in protecting the health, comfort and safety of its citizens.

The maxim *sic utere tuo ut alienum non laedas* may apply with full force to the maintenance and operation of dairies and cow stables within the limits of a populous city.

It is an occupation the pursuit of which is not necessarily harmless, inoffensive and sanitary in its effects on the community. Without stopping to elaborate details it is at once suggested to the mind that the conditions inseparable

from such pursuit may, especially in a city, be not only obnoxious and offensive to the physical senses, but may under many probable circumstances engender disease and facilitate its dissemination amongst the people.

It is claimed that dairies and cow stables are not nuisances *per se* and therefore cannot be prohibited by ordinance as if they were nuisances. But it cannot be disputed that it is within the power of the State to prohibit the carrying on of any trade or business which, while not in itself a nuisance, may become such or may be of such a character as to be or become obnoxious to the neighborhood.

Thus in the case of Linehan, 72 Cal. 114, on p. 116, the court says:

> "Subjects to Constitutional limitations, legislative authority extends to the suppression or regulation of those things which are hurtful to the general good, and, as a general rule, *the law making power will be deemed the exclusive judge of what is or is not hurtful.* The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits, may be detrimental to health and dangerous to the public safety."

So Professor Tiedeman in his late work on State and Federal Control of Persons and Property (1900), vol. 2, pp. 730-731, says that "through the interference of the *legislature* the doing of acts may be prohibited on the ground of being nuisances, which otherwise have been held to be permissible because of the public benefit resulting from thse acts." And he also adds that though the *courts,*

independently of statute, may determine that the public benefit from a certain unwholesome or annoying trade far outweighs the personal discomfort or injury to health which attends the prosecution of the trade, and for that reason refuse to prohibit its operation, that yet "the *legislature* is not precluded from reaching a different conclusion. Granting that the act or trade produces discomfort or injury to health, it is ultimately a *legislative* question whether the public welfare requires the imposition of this burden. No one has a natural right to do that which injures another. It is quite a common experience for the legislature either to prohibit altogether or to regulate the doing of that which works an annoyance or injury to others." And again, on p. 731, he cites the very instance here in question: "But when the town becomes more thickly settled and the large grounds are fast being divided up into twenty-foot lots the keeping of such animals [i. e., cows, pigs, etc.] on the premises becomes a serious nuisance, which may be restricted or *prohibited altogether,* according to the demands of public opinion."

Parker & Worthington on Public Health and Safety (1892) say in s[illegible] 254, pages 291-292: "But the power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them: they may be *entirely prohibited within the corporate limits,* though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate,' unless the occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant of authority it would be a reasonable and proper *regulation* to prohibit the carrying on, *without the consent of the proper local authorities,* of any trade or occupation which, however lawful and innocuous in itself, *may become in its ordinary exercise a public nuisance.*"

A reference to the decisions of this court shows not only that they recognize fully the right of the State to enact such Police Laws as above and here in question, but also that in cases not clearly falling within the ordinary Police Power, this court will yet, where the object sought to be accomplished is conducive to the public interest, accord to the legislative body a large discretion and liberty of choice to determine what the interests of the public require and what measures are necessary for the protection of such interests, and uphold the same unless so unreasonable and extravagant as to unnecessarily and arbitrarily interfere or destroy without due process of law the personal rights or property of the citizen.

Lawton vs. Steele, 152 U. S. 133, 136, 140.
Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.
Gundling vs. Chicago, 177 U. S. 183, 188.
Crowley vs. Christensen, 137 U. S. 86, 89, 91.

The ordinance in question was therefore clearly within the police power of the city conferred by law on it, and the only contention that need be noticed is that the *manner* of its exercise (calling for permission in each case to be granted by the Municipal Assembly before the establishment or operation of dairies or cow stables becomes lawful), confers such unlimited and arbitrary power on the Assembly as to operate as a violation of the Constitution in denying the equal protection of the laws. It is argued that the Assembly may under the ordinance arbitrarily grant to A what it denies to B under the same circumstances, and thus unjustly favor one and discriminate against another, without any common measure applicable to all.

The means employed in the ordinance are Constitutional—not arbitrary nor unreasonable.

As to this point the authorities last referred to are also in point. "If the object to be accomplished is conducive to the public interests, the legislature may exercise a large liberty of choice as to the means employed."

Lawton vs. Steele, 152 U. S., on p. 140.

Again, what this court has said in another case may not be improper in view of the contention here made of Fischer and Schefe:

> "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while, according to the principles upon which our institutions rest 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself,' yet 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.' "

Powell vs. Pennsylvania, 127 U. S., pp. 685-686, quoting from Yick Wo vs. Hopkins, 118 U. S., upon which our opponents principally rely.

In the same case the court goes on:

> "It is argued, in behalf of defendant, that if the statute in question is sustained as a valid exercise of legislative power then nothing stands in the way of the destruction of the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not

disprove its existence. That possibility exists even in reference to powers that are conceded to exist."

See further authorities Brief, Point II (d).

The plaintiff in error has not shown nor pretended to claim that any improper discrimination has been made or contemplated under this ordinance, and, as shown above, the courts are not going to supply a presumption to that effect, simply because of a possible abuse. On the contrary, the presumption is that the legislative body will act fairly and impartially and not for the purposes of profit and oppression. See numerous authorities so holding cited *ante* in our Brief Point II, subd. (c).

And as said by this court:

"The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

Soon Hing vs. Crowley, 113 U. S. 703, on pp. 710-711.

In another case where the argument was made that arbitrary power was vested in an officer, this court said:

"The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. As in many other cases, the officers may not always exercise the power

conferred upon them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States."

Crowley vs. Christensen, 137 U. S., on pp. 91-92.

Other authorities to similar effect are cited *ante* in Brief.

Looking at the ordinance in question in the light of these general and reasonable rules of law, we think there can be no doubt that the discretion vested in the Assembly to permit or deny the privilege of conducting dairies and cow stables within the limits of the City of St. Louis is reasonable and proper, and should be upheld on the general principles above mentioned.

Coming now to more particular instances we find our contentions corroborated in a number of cases in which similar ordinances were upheld by this court against the insistence here made that they conferred arbitrary and unbridled authority on certain officers or bodies.

Necessarily "there must always be lodged somewhere, and in some person or body, the authority of final decision." (118 U. S., p. 370.)

Thus an ordinance was sustained as not in conflict with the Fourteenth Amendment which provided that no person should make any public address on any of the public grounds, except in accordance with a permit from the mayor.

Davis vs. Massachusetts, 167 U. S., 43.

Against the same contention that personal rights were submitted to the unrestrained discretion of a single individual and thereby removed from the domain of law, was upheld an ordinance prohibiting the moving of any building into or

upon any street or public place, without the written permission of the Mayor, President of the City Council or in their absence, a councillor.

> Wilson vs. Eureka City, 173 U. S. 32 (commenting upon a number of authorities).

So also objection on the same ground was overruled when made against an ordinance of the City of Chicago, which committed to the discretion of the Mayor the question whether a license should be issued or declined in each case for the sale of cigarettes.

> Gundling vs. Chicago, 177 U. S. 183 (distinguishing Yick Wo vs. Hopkins, on grounds equally applicable here).

A large number of other authorities, State and Federal, to the like effect are referred to in our Brief under Point II (b) and need not be repeated here.

Enough, we think, has been said to show the validity of this ordinance.

Cases cited for plaintiff in error distinguished.

The plaintiff in error thinks his position is supported by a number of cases, mainly by Yick Wo vs. Hopkins, 118 U. S. 356, Barthet vs. New Orleans, 24 Fed. 563, State vs. Mahner, 43 La. An. 496, *In re* Hong Wah, 82 Fed. 623, and Stockton Laundry Case, 26 Fed. 611. We think none of these cases support his contention as applied to the ordinance here in question.

In Yick Wo vs. Hopkins, an ordinance was condemned which prohibited the maintenance of laundries within the limits of San Francisco without first having obtained the

consent of the Supervisors of San Francisco, "except the same be located in a building constructed either of brick or stone."

One vital difference between the ordinance there considered and the one here in question is that in the former this court held that *there was no question of police regulation involved*. The court pointed out that the ordinance was not intended to guard against fire, or against danger or discomfort to the community; that the pursuit there inhibited in wooden houses was harmless and inoffensive and the police power was not in reality involved at all or only except as a manifest guise and pretext to furnish the supervisors an excuse to discriminate against the Chinese. In connection with this phase the court said:

> "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinance in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The court also says:

> "The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

But the real decision in the case is based on the finding of the court that the ordinance was intended *solely* to exclude the Chinese and favor all others, and that the ordinance was being so applied.

In concluding the case the court says:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the said ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be

fair on its face and impartial in appearance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson vs. Mayor, etc., of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; *Ex parte* Va., 100 U. S. 339; Neal vs. Delaware, 103 U. S. 370, and Soon Hing vs. Crowley, 113 U. S. 703.

"The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. *No reason whatever,* except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their *harmless and useful occupation,* on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. * * *."

It at once strikes the mind that none of the essential features on which the court condemned that ordinance are present in the one here considered.

The case of Barthet vs. New Orleans is also distinguishable. There on an application for a temporary injunction, a Federal *nisi prius* judge held invalid an ordinance prohibiting the maintenance and operation of slaughter houses within certain limits of the city "except permission be granted by the council of the City of New Orleans."

In the first place it will be noted at once that there is a difference between that ordinance and the ordinance under discusssion. The ordinance we are considering prohibits cow stables and dairies without permission of the municipal assembly, *by ordinance*. This implies, of course, strict legislative action and concurrence by the mayor. The charter of the City of St. Louis provides how ordinances shall be enacted, and requires the concurrent action, not only of both branches of the municipal assembly, but also of the mayor. In the New Orleans case, slaughter houses were authorized to be maintained and operated only on *permission* of the council. This permission might be obtained otherwise than by legislative action; for instance, by mere resolution not requiring the concurrence of the executive, or perhaps by mere sanction given by the members of the council. In other words, the law-making body of the city undertook to delegate its powers of legislation to the members or individuals composing it. This would be in truth and in fact a delegation of legislative power *to others*. In the ordinance which is involved in this case, there is no delegation of the power which is delegated by the State to the Municipal Assembly of the City of St. Louis. The assembly is itself to determine by the usual proper legislation, that is by ordinance, when a cow stable or dairy may or may not be established and conducted. Thus the assembly is itself, and not through others, even though they be the very members of the body itself, exercising the power granted by the charter.

But the Barthet case was decided on other grounds.

Attention is called in the very opening sentence of the opinion to the fact the Article 258 of the Louisiana Constitution prohibits monopolies, and that Article 248 invests the City of New Orleans with power to regulate the slaughtering of cattle within its limits, provided no monopoly or exclusive privilege exists within the State. Attention is also called by the court to the fact that the plaintiff, acting under an ordinance of the City of New Orleans, invested large sums of money in the erection of buildings suitable for the slaughtering of cattle for food, and that after he had done so, and had *"in good faith acquired vested rights,"* the ordinance of the city was amended so as to make it unlawful to maintain slaughter houses within certain limits, embracing his, except upon permission granted by the council. The court holds that this amendment conflicts with the Louisiana State Constitution. The court says:

> "The city council has the right generally in the exercise of governmental powers such as belong to municipal corporations, to regulate the business of slaughtering animals for food," thus recognizing the rule for which we here contend, and then continues: "But under the articles 248 and 258, State Constitution—responsive as those articles are to a public sentiment long offended in this city by oppressive monopolies in the slaughtering of animals for food—it must be apparent that the city cannot directly or indirectly prohibit the business of this complainant under the pretense of exercising an ordinary governmental police power. It is clear that those articles were intended to prohibit all monopolies, and to limit rather than enlarge the police powers of the city in relation to slaughtering cattle, etc., and if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others. *By giving its permission to an individual or to a corporation, and refusing it to all others, a monopoly could be established by the favored suitor.*"

The foregoing indicates very plainly that the court recognized the general police power of the city, but concluded that it might be so abused as to create a monopoly, in violation of the State Constitution. So far as the court undertakes to suggest that the ordinance may be void, merely because the council might withhold permission from all but one favored applicant, and thus create a monopoly, it comes into conflict with the decisions of this court that an ordinance or law will not be held invalid simply because its provisions may be abused. Rather will the court indulge in the proper presumption that the law making body will, like all officers, act in good faith and upon the exercise of a proper judgment and discretion, than that it will take advantage of its powers and abuse them. If any presumption is to be indulged in, in connection with the ordinance here attacked, it is that the municipal assembly will, by ordinance, grant permission for the erection or maintenance of dairies or cow stables in all proper cases, and will withhold such permission whenever it would operate injuriously on the rights of others.

State vs. Mahner, 43 La. An. 496 is another of the cases principally relied on in attacking the ordinance. That case differs from this because here express power to prohibit dairies altogether is conferred on the city, and the ordinance now in question is a police regulation in the public interest. In the Louisiana case the court based its decision on the ground that that ordinance "was not enacted in the interest of the public health," nor did the court "consider the right or power of the city to *prohibit* dairies within the city limits." "The permission to keep dairies within the limits negatived the view that the ordinance was enacted in the interests of the public health." There was in that case no right to prohibit *in toto*.

At all events if the case were in point it would not be in ac-

cord with the decisions of this court and many others including Missouri.

> The case of *In re* Hang Wah, 82 Fed., 623, is one in which the court (as in Yick Wo vs. Hopkins) found that there was no reasonable ground to invoke any police regulations, the vocation there inhibited in certain localities (the laundry business) being held to be necessarily harmless and inoffensive and not furnishing any basis for the regulation attempted, and that no question of the exercise of the police power was therefore involved.
>
> The Stockton Laundry Case, 26 Fed., 611, is distinguishable on the same ground. This is apparent from what the court says (p. 611), speaking of the laundries prohibited under the ordinance: "All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is."
>
> It is evident that these cases are wholly different in their facts and the spirit of the ordinance, from the one at bar.

Many other of the authorities of plaintiff in error have been distinguished in later cases on grounds equally applicable here, some instances of which are indicated in the citations in our Brief. It is always well to remember that each case involving the validity of a police regulation depends largely on its own circumstances; for, as has been said, "It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers." (170 U. S. 45; 158 Mo. 540).

The ordinance in question here is a bona fide police regulation, duly authorized by the Charter; and in view of its manifest purpose when interpreted in the light of the prevailing conditions, it is absolutely justifiable.

We submit the decision of the Supreme Court of Missouri was right and should be affirmed.

Respectfully submitted,

CHAS. W. BATES,
WM. F. WOERNER,
CHAS. R. SKINKER,
For Defendant in Error.

Supreme Court of the United States.

No. 204.—October Term, 1903.

John G. Fischer, Plaintiff in Error, vs. The City of St. Louis. } On writ of error to the Supreme Court of the State of Missouri.

[May 16, 1904.]

This proceeding was originally instituted by a criminal complaint filed by the city of St. Louis against Fischer in the Police Court for a violation of an ordinance of the city in erecting, building and establishing on certain premises occupied by Fischer, at Nos. 7208 and 7210 North Broadway, a dairy and cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance, and for maintaining such dairy and cow stable without permission of such assembly.

Motion was made to quash the complaint upon the ground, amongst others, that section 5 of the ordinance under which the conviction was held was in violation of the Fourteenth Amendment of the Constitution of the United States.

The case was submitted to the court upon the following agreed statement of the facts:

"The plaintiff, the City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable, which had been erected and built prior to the occupancy of said premises by defendant."

"At the time of the approval of ordinance No. 18,407, of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway *were abandoned* as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for *residence purposes only*, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue,

said city, on to premises Nos. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896," a copy of which section is given in the margin.*

Upon this state of facts defendant was convicted and fined. An appeal was granted to the St. Louis Court of Criminal Correction, which affirmed the judgment. An appeal was then taken to the Supreme Court of the State, where the judgment was again affirmed. (167 Mo. 654.)

Mr. Justice BROWN delivered the opinion of the Court.

The authority of the city of St. Louis to adopt the ordinance in question is found in the Revised Statutes of the State, (1899, pp. 2486 and 2488,) which declares: "The mayor and assembly shall have power, within the city, by ordinance not inconsistent with the Constitution, or any law of this State, or of this charter, . . . to . . . prohibit the erection of . . . cow stables and dairies . . . within prescribed limits, and to remove and regulate the same."

"Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or of the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars."

The authority of the municipality of St. Louis, under this charter, to adopt the ordinance in question was settled by the decision of the Supreme Court, and is not open to attack here.

Considerable stress is laid upon the fact that at the time the ordinance was adopted, (April 6, 1896,) the dairy and cow stable had already been erected and at that time was occupied and in use for that purpose, though such use was subsequently abandoned and the premises used as a private resi-

*SEC. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred nor more than five hundred dollars.

dence for a short time, when defendant moved his cattle there and established anew the dairy and cow stable which had theretofore been used. The Supreme Court, however, found that defendant was guilty of maintaining a dairy and cow stable within the meaning of the ordinance without permission of the municipal assembly, and as this construction of the ordinance involves no Federal question, we are relieved from the necessity of considering it.

Defendant's objection to the ordinance, that it is made to apply to the whole city when authority was only given by the charter to prohibit the erection of cow stables and dairies "within prescribed limits," is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance it was held by the Supreme Court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-Federal question.

Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons and against all other persons, and the equal protection of the laws denied to all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, &c. (*In re Linehan*, 72 Cal. 114; *Quincy* v. *Kennard*, 151 Mass. 563; *Love* v. *Judge*, 128 Mich. 545.)

We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs; or, where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands

of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. (*Crowley* v. *Christiansen*, 137 U. S. 86; *Davis* v. *Massachusetts*, 167 U. S. 43; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710.)

The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who to that extent would be limited in their supply of milk. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the State courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, (*Chicago* v. *Trotter*, 136 Ill. 430; *Matter of Frazee*, 63 Mich. 396; *State* v. *Fiske*, 9 R. I. 94; *Baltimore* v. *Radecke*, 49 Md. 217; *Sioux Falls* v. *Kirby*, 6 S. D. 62,) and in others that such authority cannot be delegated to the adjoining lot owners. (*St. Louis* v. *Russell*, 116 Mo. 248; *Ex parte Sing Lee*, 93 Cal. 354.) But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, (*Quincy* v. *Kennard*, 151 Mass. 563; *Commonwealth* v. *Davis*, 162 Mass. 510,) and by this court the delegation of such power, even to a single individual, was sustained in *Wilson* v. *Eureka City*, (173 U. S. 32,) and *Gundling* v. *Chicago*, (177 U. S. 183.)

Whether the defendant be in a position to avail himself of the alleged invalidity of the ordinance without averring that he applied for and had been refused a permit to establish the dairy and cow stable in question, as was intimated in the latter case, is not necessary to a decision here, and we express no opinion upon the point.

It is sufficient for us to hold, as we do, that the ordinance in question

does not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

The judgment of the Supreme Court of Missouri is, therefore,

Affirmed.

No. 62.

Bernard Schefe *vs.* The City of St. Louis. } In error to the Supreme Court of the State of Missouri.

This case is similar to the last in every material particular, and, for the reasons stated in that case, is also

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.